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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

RENE GERARD HARRIS,

Defendant and Appellant.

C086386

(Super. Ct. No. 17F3889)

A jury found defendant Rene Gerard Harris guilty of possession of a firearm by a felon. (Pen. Code, § 29800, subd. (a); statutory section references that follow are to the Penal Code unless otherwise stated.) In a bifurcated proceeding, the trial court found true a prior strike allegation. (§ 1170.12.) The court sentenced defendant to four years in state prison.

On appeal, defendant argues the trial court violated his due process right to a fair trial by instructing the jury, over his objection, on flight (CALCRIM No. 372). Finding no error, we affirm the judgment.

FACTS AND PROCEEDINGS

Just after noon on July 21, 2017, Redding Police Officer Jon Sheldon was watching an apartment for which a search warrant had been issued. Defendant was not named in the warrant. Officer Sheldon was driving an unmarked police vehicle and was wearing his police uniform, which included a badge with the words “Redding Police Department” embroidered on it and a belt with a gun and a radio. Over his shirt, he wore a separate piece of body armor with the word “police” on it.

Officer Sheldon saw several male and female adults leaving the apartment apparently “in a hurry.” He said the members of the group quickly left one at a time and headed toward Boulder Creek Drive. He noted that one person “ran from the apartment.” Defendant was later identified as one of the people leaving the apartment.

Officer Sheldon radioed Officer Ryan Ellis and told him that several people had left the apartment. He described those people and instructed Officer Ellis to keep them under surveillance. Thereafter, Officer Sheldon was told that a person who had been in the apartment and had been separately detained said there were firearms in the apartment. This caused Officer Sheldon concern that one or more of the people in the group that left the apartment might have a firearm.

Officer Ellis, driving an unmarked police car, went to the intersection of Lake Boulevard and North Boulder Drive and told Officer Sheldon that he saw three females and one male (defendant) walking south on North Boulder Drive. Two of the women were carrying small children, and a third woman was pulling a small, purple, wheeled suitcase behind her. Defendant walked in front of the women, carrying nothing. At some point, defendant walked back toward the three women, took the purple suitcase from one

of them, and began pulling it behind him as the three women followed. Officer Ellis waited for Officer Sheldon to drive past and then followed him to the Shasta Lane Bowling Alley.

Officer Sheldon went to the bowling alley. When he pulled into the bowling alley parking lot, he saw defendant looking over his shoulder and looking around in all different directions with a “panicked look” on his face. Officer Sheldon got out of his car, drew his service weapon, and attempted to control the group by instructing the females, two of whom were holding infants, to sit down and instructing defendant to lay face down on the ground. The women complied but defendant did not despite Officer Sheldon giving him “numerous” orders to stop and lay down on the ground. Instead, defendant continued to walk away towards the bowling alley, looking around in all different directions.

Within seconds, Officer Ellis arrived at the bowling alley and saw Officer Sheldon, who was outside of his vehicle, pointing his gun toward defendant and instructing defendant to stop. Officer Ellis observed that defendant did not initially comply and instead looked around and walked towards the stairs and away from Officer Sheldon. Officer Ellis, having received information that there were firearms inside the apartment that law enforcement officers had been watching, was concerned that one or more members of the group might have a firearm in their possession. Given that defendant was not complying with Officer Sheldon’s commands, Officer Ellis drew his gun, pointed it at defendant, and ordered defendant to stop. Defendant finally stopped after having walked partway up the stairs to the bowling alley.

When Officer Garrett Maxwell arrived at the bowling alley, he saw defendant standing on the stairs leading into the bowling alley, and he saw the purple suitcase “on the steps.” Officer Sheldon later testified that he saw the purple suitcase at the base of the stairs used by defendant. A search of the suitcase revealed two firearms, as well as several pairs of baby socks and a pacifier.

DISCUSSION

Defendant says the trial court, using CALCRIM No. 372, erred by instructing the jury on flight. The jury was instructed as follows: “If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude the defendant fled or tried to flee, it is up to you [to] decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself. Flight does not require a person to physically run from the scene or make an escape. What is required is acting with the purpose of avoiding observation or arrest.” Defendant contends the error violated his right to due process of law and a fair trial.

Specifically, defendant argues the flight instruction given by the trial court amounted to a directed verdict because it presumed a crime was committed, it impermissibly lowered the prosecution’s burden of proof, and it was not supported by substantial evidence.

I

Defendant’s Knowledge of a Crime

First, defendant asserts the flight instruction allowed the jury to find consciousness of guilt without making the requisite preliminary factual finding that he knew he was being accused of possessing guns. He contends an inference of guilt from flight would be “irrational in violation of federal due process” unless a defendant has knowledge of both the fact that the crime was committed and that he may be accused of that crime. He concedes our state’s Supreme Court rejected a similar argument in *People v. Pensinger* (1991) 52 Cal.3d 1210, 1243 [§ 1127c permits a flight instruction whenever the prosecution relies on evidence of flight to show guilt, eliminating the common law requirement that a jury may not be instructed on flight unless there is evidence that the

defendant was aware he had been accused of a crime before he fled], a decision we are bound to follow, but raises the issue nonetheless to preserve it for federal review.

II

The Flight Instruction was Supported by Substantial Evidence

As we read it, defendant next contends the flight instruction was not supported by substantial evidence. Citing *United States v. Silverman* (9th Cir. 1988) 861 F.2d 571, 581 (*Silverman*), defendant asserts that in order to determine whether there are facts that support the inference from flight to a consciousness of guilt of the specific crime charged, “four inferences must be justified: ‘(1) from the defendant’s behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.’ [Citation.]” (*Ibid.*)

Silverman, a decision of the federal Ninth Circuit Court of Appeals, is not binding on this court and we are not required to adopt the rather baroque analysis the court adopted there. Suffice it to say that defendant’s contention is adequately addressed by existing California law.

An instruction on flight is properly given if defendant’s flight reflected consciousness of guilt, and “[f]light requires neither the physical act of running nor the reaching of a far-away haven.” (*People v. Cannady* (1972) 8 Cal.3d 379, 391.) Flight manifestly does require, however, a purpose to avoid being observed or arrested.

“ ‘In general, a flight instruction “is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.” ’ [Citations.] Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest ‘a purpose to avoid being observed or arrested.’ [Citations.] To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid

arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence. [Citation.]” (*People v. Bonilla* (2007) 41 Cal.4th 313, 328; accord, *People v. Carter* (2005) 36 Cal.4th 1114, 1182; *People v. Leon* (2015) 61 Cal.4th 569, 607.)

The evidence showed that defendant hurriedly left the apartment under surveillance with three women, one of whom was pulling a suitcase containing nothing but guns, a few pairs of baby socks, and a pacifier. He took the suitcase from the woman and proceeded to pull it along with him away from the apartment.

Officer Sheldon intercepted the group in the bowling alley parking lot. The officer was wearing a police uniform that bore a badge with the words “Redding Police Department” embroidered on it. Over the shirt was a separate piece of body armor with the word “police” on it. Officer Sheldon was also wearing a belt with a gun and a radio. When Officer Sheldon drew his weapon and ordered defendant to lay face down on the ground, defendant looked over his shoulder and all around with a “panicked look” on his face and continued walking away from Officer Sheldon and up the stairs to the bowling alley. Officers Sheldon and Ellis both testified that, despite repeated commands from Officer Sheldon, defendant continued to walk away towards the bowling alley, looking in all different directions. It was not until Officer Ellis arrived and pointed his gun at defendant and ordered him to stop that defendant, who had walked partway up the stairs, finally complied.

Given these facts, the jury could reasonably infer that defendant’s attempts to avoid the law enforcement officers reflected a consciousness of guilt, that is, a consciousness that he was a felon and that there were guns in the suitcase which was in his possession and, thus, a consciousness of guilt of the crime of being a felon in possession of a firearm. The facts presented at trial were sufficient to support an instruction on flight.

While defendant claims it was questionable whether he was attempting to avoid arrest, whether he was aware the suitcase contained guns, and whether he was “more concerned about the reason the apartment was being searched than about being connected to the guns in the suitcase he might not have known about,” those were factual determinations to be made to the jury in order to find him guilty and they did not undermine the propriety of the flight instruction.

III

The Flight Instruction as a Directed Verdict

Next, defendant contends the flight instruction given by the trial court amounted to a directed verdict because it presumed a crime was committed and impermissibly lowered the prosecution’s burden of proof.

“On review, we examine the jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood the challenged instruction in a way that undermined the presumption of innocence or tended to relieve the prosecution of the burden to prove defendant’s guilt beyond a reasonable doubt.”

(*People v. Paysinger* (2009) 174 Cal.App.4th 26, 30 (*Paysinger*).)

We rejected similar arguments in *Paysinger, supra*, 174 Cal.App.4th at pages 30-31, and see no reason to revisit that decision here despite defendant’s claim that *Paysinger* was wrongly decided. We note that, by its own language, the flight instruction did not presume a crime had been committed or lower the prosecution’s burden; instead, the instruction left the decision of whether or not defendant fled to the jury by stating, “*If the defendant fled or tried to flee immediately after the crime was committed,*” and then instructed the jury that if it so found, it was up to the jury to determine “the meaning and importance of that conduct,” noting any “evidence that the defendant fled or tried to flee *cannot prove guilt by itself.*” (Italics added.) Here, the jury was instructed that defendant was presumed innocent, that the jury was to decide the facts of the case, that it was the

People’s burden to prove guilt beyond a reasonable doubt, and that he was entitled to an acquittal if the People failed to meet that burden of proof (CALCRIM Nos. 220, 222 & 224). As the People aptly note, we “examine the jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood the challenged instruction in a way that undermined the presumption of innocence or tended to relieve the prosecution of the burden to prove defendant’s guilty beyond a reasonable doubt.” (*Paysinger, supra*, 174 Cal.App.4th at p. 30.) Considering the jury instructions as a whole, we conclude it was not likely the jury interpreted the instructions, including the flight instruction, in such a way that lowered the People’s burden of proof.

IV

Prejudice

Given our conclusion that instructing the jury in accordance with CALCRIM No. 372 was not error, we need not reach defendant’s claim that he was prejudiced by instructional error.

DISPOSITION

The judgment is affirmed.

HULL, Acting P. J.

We concur:

MAURO, J.

MURRAY, J.